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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONSOLIDATION COAL COMPANY,
Petitioner,

vs.

SHARON SNIDER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATION TO THE OPINION BELOW

The opinion of the three judge panel of the Seventh Circuit Court of Appeals, rendered on August 26, 1992, is reported at 973 F.2d 555 (7th Cir. 1992). The full Court of Appeals denied rehearing en banc on September 28, 1992. A copy of the panel's opinion is printed as Appendix A to petitioner's submission and therefore will not be reprinted herein by respondent.

STATEMENT OF THE CASE

The respondent, Sharon Snider, was a coal miner. She worked for the petitioner, Consolidation Coal Company, at one of its

surface mines in southern Illinois. Her experience there was not happy. On the contrary, it was tragic. She was the victim of severe and pervasive acts of sexual harassment, including coerced sexual intercourse and forced oral sex, committed by Richard Delloma, the Superintendent of the mine. As a result of the harassment, she tried to commit suicide, was emotionally disabled from working at the mine, and incurred substantial medical expenses and lost income.

Ms. Snider brought this lawsuit to try to remedy the wrong done to her. She asserted a Title VII claim under federal law against Delloma and the coal company and several tort claims under state law against the two defendants. The tort claims were tried to a jury and the Title VII claim was tried simultaneously to the Court. At trial, the key issue was credibility. Ms. Snider set forth her allegations and Delloma denied them. In an effort to discredit her, defendants pointed to the fact that Ms. Snider failed to lodge a contemporaneous complaint against Delloma. According to the defendants, Ms. Snider's failure to report Delloma's sexual misconduct meant that she was lying about it. Defendants returned to this important theme over and over again throughout the course of the trial.

To counter defendants' argument, Ms. Snider offered the expert testimony of Dr. Freada Klein, a consultant to employers who has surveyed literally hundreds of thousands of employees in the public and private sector concerning their experiences with sexual harassment. Among other things, Dr. Klein explained that only 5% or less of the victims of severe on-the-job sexual harassment actually take advantage of available complaint mechanisms. She explained that women do not report such harassment because of fear of reprisal and fear of loss of privacy. The trial judge refused to allow the jury to hear Dr. Klein's testimony. He did not believe it was admissible on the state tort claims. The trial judge did believe, however, that Dr. Klein's testimony was clearly admissible on the Title VII claim. Accordingly, he heard

her testimony, outside the presence of the jury, for purposes of the Title VII claim.

Apparently, the jury did not believe Ms. Snider's allegations of sexual harassment. At the conclusion of the trial, it returned verdicts against her on the state tort claims. The trial judge, however, did believe Ms. Snider's allegations of sexual harassment. He issued a written decision, relying heavily on Dr. Klein's testimony, ruling in favor of Ms. Snider on the Title VII claim and awarding her back pay and front pay. The coal company appealed.

On appeal, a panel of the Seventh Circuit Court of Appeals affirmed the judgment in favor of Ms. Snider on the Title VII claim. The Court rejected the defendant coal company's argument that the trial judge was bound, under the doctrine of collateral estoppel and the Seventh Amendment to the U.S. Constitution, to follow the jury's findings:

> In the case at bar, crucial evidence was allowed in the Title VII hearing that was not (and could not be) presented to the jury; namely, Dr. Klein's testimony. The jury's verdict turned on one single issue: whether the jurors believed Snider's version of the events, or whether they believed Delloma's. [One] of the key facts relied upon by the defendants' attorneys in attacking Snider's veracity was her failure to complain about Delloma's actions . . . Dr. Klein's testimony addressed this issue by making it clear that few victims of sexual harassment make a contemporaneous complaint, particularly if the harassment occurs in an occupation traditionally dominated by members of the opposite sex.... Because Dr. Klein's testimony was critical to an important issue in the case, but was excluded from the jury trial through no fault of the plaintiff, the district court did not improperly render a decision contrary to the findings of the jury.

See Petitioner's Appendix A at A7-A9. The Court's opinion, which was written by Judge Gibson and joined by Judge Manion and Chief Judge Bauer, was unanimous. The coal company filed a petition for rehearing en banc but it was unanimously denied by the full Court. Running out of options, the coal company filed a petition for a writ of certiorari with this Court seeking review of the Seventh Circuit's decision against it.

SUMMARY OF ARGUMENT

The general rule is that when common factual issues are tried to both a judge and a jury the jury's findings on the common factual issues are binding on the judge. But this rule, like most rules, has exceptions. The rule does not apply when important evidence is available to the judge which was not available to the jury. That is the situation here. The trial judge heard crucial evidence supporting respondent Snider's credibility — the testimony of her expert witness Dr. Freada Klein — which the jury did not hear. Consequently, the trial judge was free to reject the jury's findings against Ms. Snider and substitute his own findings in favor of Ms. Snider. Significantly, the petitioner coal company is unable to cite a single case in its petition for certiorari which holds that a judge must follow the jury's findings where, as here, the judge hears important admissible evidence which the jury did not hear. On the contrary, there are numerous cases which hold that the judge is not bound to follow the jury's findings under these special circumstances. The Seventh Circuit's decision in this case is correct on the merits and does not conflict with any decisions by other federal appellate courts. Accordingly, it does not warrant review by this Court.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

The petitioner coal company contends that the trial judge had to conform his findings on the Title VII claim to the jury's findings on the state tort claims. The coal company argued in the Court below that this result is mandated by (1) the common law doctrine of collateral estoppel and (2) the Seventh Amendment to the U.S. Constitution. The coal company is mistaken on both counts. Each will be discussed in turn.[1]

1. Collateral Estoppel

This Court has held that collateral estoppel will not bar relitigation of an issue when a second action affords a party "procedural opportunities unavailable in the first action that could readily cause a different result." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-331 (1979). The fact that new evidence can be introduced in the second action, which could not be introduced in the first action, will warrant denying issue preclusion on the ground of fairness if the new evidence is of the sort which might (not necessarily will) lead to a different result. *Jack Faucett Associates v. American Tel. & Tel.*, 744 F.2d 118, 126 (D.C. Cir. 1984); *Carr v. District of Columbia*, 646 F.2d 599, 606 n. 35 (D.C. Cir. 1980); *Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544, 551 (7th Cir. 1977); *Technograph Printed Circuits, Ltd. v. United States*, 372 F.2d 969, 979 (Ct. Cl. 1967); *Restatement (Second) of Judgments* §29, comment j at p. 303 (1982).

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[1] In the Court below, the coal company relied heavily upon the common law doctrine of collateral estoppel. Indeed, it did not even mention the Seventh Amendment until it filed its reply brief in the case. In this Court, however, the coal company relies heavily upon the Seventh Amendment. In fact, it seems to disavow any reliance at all upon the common law doctrine of collateral estoppel. Ms. Snider will discuss both issues. A clear understanding of the doctrine of collateral estoppel will serve to put the coal company's Seventh Amendment argument in proper context.

At the heart of this case was a question of credibility: was Sharon Snider telling the truth about Richard Delloma? Since there were no witnesses to the sexual harassment, Ms. Snider's credibility was the critical issue of fact in the case. According to the coal company, this issue was adjudicated adversely to Ms. Snider by the jury hearing the state tort claims. It insists she was collaterally estopped from relitigating the same issue before the judge hearing the Title VII claim. But the coal company stubbornly refuses to come to grips with the fact that the trial judge heard crucial evidence supporting Ms. Snider's credibility which the jury did not hear. This was the testimony of Ms. Snider's expert witness Dr. Freada Klein. Dr. Klein's expert testimony was highly probative of Ms. Snider's credibility and could, and did, influence the judge to reach a different result from the jury.

At trial, the defendant coal company made much of the fact that Ms. Snider did not lodge a contemporaneous complaint against Delloma with any of her doctors, with her union, with her employer, with the police or with the Illinois Department of Human Rights. The company and its co-defendant, Delloma, never missed an opportunity to hammer away at this fact. They emphasized it in their opening statements (Tr. I at 41-43, 49) and in their closing statements (Tr. VII at 15, 17-22, 24, 27-29, 33-34, 39-40). And everywhere in between. They emphasized it in their cross-examination of Ms. Snider (Tr. II at 49-57, 71-72, 77, 84-86, 88, 139-143, 156-157, 163; Tr. VI at 57, 59-60) and in their cross-examination of Ms. Snider's witnesses (Tr. II at 202; Tr. IV at 44, 72, 81, 101). They emphasized it in their case in chief to the point of mindnumbing tedium (Tr. V at 14-15, 22, 25-26, 34-35, 49-51, 54-56, 61, 65, 136, 141, 173). They brought a parade of witnesses into court, six of them, whose sole or primary purpose in testifying was to establish that Ms. Snider knew she could complain of sexual harassment but nevertheless refused to do so (Tr. V at 12-92, 133-169). These company and union officials testified in elaborate detail concerning the post-

ers, seminars, retraining sessions, union meetings and other ways in which women at the mine, including Ms. Snider, were informed of their right to protest unlawful sexual harassment. As the coal company put it during closing argument, "witness after witness after witness" testified "ad nauseam" to these matters (Tr. VII at 15, 21). The extraordinary extent to which the defendants dwelled upon Ms. Snider's failure to complain testifies to its extraordinary importance in the case. It was *the* defense for the defendants. Their message to the jury and to the judge was clear and simple: Ms. Snider did not report Delloma because there was nothing to report. She was lying.

This line of attack seriously damaged Ms. Snider's credibility. Left unrebutted, it would have been fatal. As it was, Dr. Klein explained Ms. Snider's failure to complain and cast an entirely different light upon it. She repaired the damage done to Ms. Snider's credibility. She did this by explaining that the overwhelming majority of women do not report sexual harassment of the kind endured by Ms. Snider. In fact, only 5% or less of the women who are victims of severe on-the-job sexual harassment actually take advantage of available complaint mechanisms (Tr. III at 113-114). Significantly, this holds true in both union and non-union workforces (Tr. III at 115, 123-124). These are startling facts, ones which are scarcely known to the average juror or judge. Dr. Klein explained that major research studies conducted over the past ten years, including her own, show there are two basic reasons for the phenomenon.

First, is the victim's fear of reprisal (Tr. III at 115). In this case, Ms. Snider testified she was afraid to report Delloma for fear of jeopardizing her employment (Tr. II at 157). That is understandable, since her allegations were quite serious, and unless the company believed them and fired Delloma, she would always remain vulnerable to retaliation from him. Second, is the victim's fear of loss of privacy (Tr. III at 115). Many women are reluctant to register a formal complaint of severe sexual harass-

ment when it means recounting and repeating to others the vile and humiliating details of their experiences. In this case, Ms. Snider testified she did not tell any of her doctors about her experiences with Delloma because "I can't talk about things like that. I couldn't do that" (Tr. II at 180). When Delloma brought her back to her worksite after forcing her to perform oral sex on him, she did not tell her foreman what had just happened because "I was embarrassed. I was in shock" (Tr. I at 79). She did not file a rape report with the police because "I did not want it to be known what he had done to me" (Tr. II at 86). Dr. Klein's expert testimony served to reinforce and validate Ms. Snider's reasons for not reporting Delloma's sexual misconduct. More importantly, it served to inform the trier of fact that her failure to complain was not at all unusual and that it was, in fact, the norm among women who are sexually victimized by their bosses at work. It did *not* mean she was lying.

Significantly, the coal company did not object to Dr. Klein's testimony on this important point when it was introduced at trial as part of the Title VII case (Tr. 113-115). Moreover, as the Seventh Circuit pointed out, "Consol has not appealed the court's decision to admit Dr. Klein's testimony for purposes of the Title VII claim." *See* Petitioner's Appendix A at A4 n. 5. Thus, the coal company did not challenge Dr. Klein's testimony, at trial or on appeal, when it had the opportunity to do so. That is not surprising, since any challenge to the admissibility of Dr. Klein's testimony would have surely failed. Expert testimony is always admissible when used defensively to counter an attack on the credibility of a victim of sexual abuse. As one commentator has observed:

> When the expert is explaining that specific behavior, which the defense has suggested is unusual and demonstrates a lack of credibility, is in fact commonplace among those who have been victimized, the evidence is universally admitted.

See Mosteller, *Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence*, 52 Law and Contemporary Problems 85, 119-120 (1989). This basic principle is firmly embedded in the caselaw. *See, e.g., U. S. v. Winters*, 729 F.2d 602, 605 (9th Cir. 1984) (expert testimony is admissible to explain why victims of forced prostitution would not "take advantage of opportunities to escape or call for help"); *People v. Hampton*, 746 P.2d 947, 951-952 (Colo. 1987) (expert testimony is admissible to explain that a "rape victim who is assaulted by somebody she knows rather than by a stranger is generally more reluctant to report the assault to police because of fear of retaliation"); *State v. Petrich*, 683 P.2d 173, 178, 180 (Wash. 1984) (expert testimony is admissible to explain the delayed reporting patterns of sexually abused children, including statistics showing "that delay in reporting is not unusual"); *Smith v. State*, 277 S.E.2d 678, 683 (Ga. 1981) (expert testimony is admissible to explain why a person suffering from the battered woman syndrome "would not leave her mate [and] would not inform police or friends").

According to the coal company, the Seventh Circuit ruled that the trial judge acted properly in barring Dr. Klein from testifying before the jury. This is fantasy. The Seventh Circuit made no such ruling. In any event, the relevant question is not whether Dr. Klein's expert testimony was properly before the jury on the state tort claims. Rather, the relevant question is whether Dr. Klein's expert testimony was properly before the judge on the Title VII claim. *See, e.g., Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544, 549-551 (7th Cir. 1977) (collateral estoppel not applied because Dead Man Act, which barred crucial testimony in the first proceeding, did not bar the testimony in the second proceeding). As noted, the trial judge heard Dr. Klein's testimony, outside the presence of the jury, for purposes of the Title VII claim. Clearly, the Seventh Circuit was correct in ruling that Dr. Klein's testimony was properly admitted into evidence as part of the Title VII case. *See* Petitioner's Appendix A at A4 n.

5 and A8-A9. After all, the coal company failed to assert a timely objection to it.[2]

We need not speculate whether Dr. Klein's compelling testimony in this case could have influenced the judge to reach a different result from the jury. We know that it did. The trial judge relied heavily upon Dr. Klein's testimony in ruling in favor of Ms. Snider on her Title VII claim. Indeed, he made thirty specific factual findings, six of which were based exclusively on Dr. Klein's testimony. Significantly, he concluded that Ms. Snider was telling the truth about Delloma despite her failure to register a contemporaneous formal complaint against him. He expressly rejected the coal company's argument that her delay in reporting Delloma's conduct meant that it did not occur or that it was welcomed:

> Plaintiff's reluctance to file a formal complaint against Delloma is consistent with the patterns exhibited by subordinate employees who are subjected to sexual harassment by their supervisors. The Court finds that although plaintiff did not file a union grievance or a formal EEOC complaint, the attention by Delloma was unwelcome and constituted sexual harassment.

See Petitioner's Appendix C at A24. Given the importance of Dr. Klein's testimony, and the fact that the jury did not hear it, the trial judge did not err in refusing to follow the jury's findings. The trial judge was free, under a well-recognized exception to-

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[2]The coal company's reliance on *O'Reilly v. Malon*, 747 F.2d 820 (1st Cir. 1984), is completely misplaced. In that case, the plaintiff argued that collateral estoppel should not be applied because certain evidence was improperly excluded by the trial judge. In a footnote, the First Circuit rejected this argument, pointing out that it had already ruled in a prior appeal that the trial judge acted properly in excluding the evidence. *Id.* at 823 n. 3. In the present case, by contrast, the Seventh Circuit did not rule that Dr. Klein's expert testimony was inadmissible. On the contrary, it correctly ruled it was admissible.

the doctrine of collateral estoppel, to make his own findings which differed from those of the jury.

2. The Seventh Amendment

The petitioner coal company contends that the Seventh Amendment right to trial by jury means that a trial judge hearing an equitable Title VII claim must follow the jury's factual findings on concurrently tried legal tort claims. This is unquestionably wrong. The Seventh Amendment guarantees the right to trial by jury on legal, not equitable, claims. *Local No. 391 v. Terry*, 110 S.Ct. 1339, 1344-1345 (1990). The coal company got its jury trial on the legal tort claims in this case. That is all the Seventh Amendment required. Courts have held that there is no constitutional right to trial by jury on an equitable Title VII claim. *See, e.g., Lincoln v. Board of Regents of Univ. System*, 697 F.2d 928, 934 (11th Cir. 1983). The coal company cannot seriously contend that the jury's findings on the legal tort claims, to which the Seventh Amendment applies, must carry over and bind the judge on the equitable Title VII claim, to which the Seventh Amendment does not apply. Taken seriously, such a contention would confer on the coal company a constitutional right to trial by jury on an equitable Title VII claim which the courts have held does not exist.

Judge Posner threw cold water on the coal company's constitutional argument in *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990). In that case, the employee joined a legal claim under 42 U.S.C. §1981, triable to the jury, with an equitable claim under Title VII, triable to the court. Judge Posner, writing for the Court, explained that the trial judge could reject the jury's findings and substitute his own findings without violating the Seventh Amendment:

> And there would be no logical inconsistency in the judge's refusing to set aside the jury's verdict because he could not say that it was unreasonable, while disagreeing with the verdict and therefore entering a contrary judgment on

> parallel claims not triable to a jury. What is true is that the judge's findings of fact could not foreclose the jury in its domain, *Lytle v. Household Mfg., Inc.*, 110 S.Ct. 1331, 1335-37 (1990), because this would impair the parties' rights under the Seventh Amendment. ***But that is not a danger when the question is whether the jury's findings should have preclusive effect on claims to which the Seventh Amendment does not apply.***

908 F.2d at 113 (emphasis added). As usual, Judge Posner's reasoning is concise, accurate and unanswerable. It has been echoed by at least two other federal circuit courts. *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1529 n. 4 (11th Cir. 1990); *Wallace Motor Sales v. American Motors Sales Corp.*, 780 F.2d 1049, 1063-1067 (1st Cir. 1985). Without doubt, the coal company's constitutional argument based on the Seventh Amendment is without merit. Accordingly, it is not worthy of review by this Court.[3]

The coal company's constitutional argument would fail in the particular circumstances of this case even assuming, for the sake of argument, that there exists a general rule, rooted in the Seventh Amendment, which binds the judge to the jury's findings. Any such general rule would have to recognize an exception for cases where, as here, crucial evidence can be presented to the judge which could not be presented to the jury. As discussed, the common law doctrine of collateral estoppel, which ordinarily

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[3] The coal company seems to think that this Court's decision in *Lytle v. Household Mfg., Inc.*, 110 S.Ct. 1331 (1990) is somehow relevant to the present case. It is not. *Lytle* stands for the unremarkable proposition that "[w]hen legal and equitable claims are joined in the same action, the right to jury trial on the *legal* claim, including all issues common to both claims, remains intact." *Id.* at 1335 (emphasis added). As noted, the coal company got its jury trial on the legal claims in this case. So everything that *Lytle* requires was provided to the coal company. *See Wise v. Dallas & Mavis Forwarding Co.*, 751 F.Supp. 90, 92-93 (W.D.N.C. 1990).

binds the judge to the jury's findings, recognizes such an exception. It stands to reason the Seventh Amendment would recognize the same exception. Indeed, the coal company admitted as much at oral argument in the Court below. As the Seventh Circuit pointed out, the coal company "conceded the analysis would be the same whether we analyzed this case under the Seventh Amendment or collateral estoppel." *See* Petitioner's Appendix A at A6-A7.[4]

CONCLUSION

Petitioner has failed to demonstrate the existence of any special or important reasons why a writ of certiorari should be granted in this case. Accordingly, the writ should be denied.

Respectfully submitted,

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[4]The coal company suggests that the jury verdicts against Ms. Snider must be given preclusive effect because Ms. Snider did not ask the Seventh Circuit to set them aside. This Court has recognized, however, that there are a multitude of reasons for refusing to give preclusive effect to a prior judgment which do not require that the prior judgment must first be set aside. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-331 and n. 15 (1979). This case presents one of them. As noted, courts will refuse to give preclusive effect to a jury verdict rendered in a prior action when material evidence can be introduced in the second action which could not be introduced in the prior action. Significantly, this is true even if the jury verdict in the prior action has not been set aside as invalid. *See, e.g., Jack Faucett Associates, supra*, 744 F.2d at 127-129; *Butler, supra*, 546 F.2d at 548-552.